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No. 87-5840

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In The

Supreme Court of the United States

October Term, 1987

EDWARD MCNAMARA,

Appellant,

v.

COUNTY OF SAN DIEGO
DEPARTMENT OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF OF APPELLEE

LLOYD M. HARMON, JR., County Counsel
County of San Diego

1600 Pacific Highway, Rm. 355
San Diego, California 92101-2469
Telephone: (619) 531-4847

JEROME A. BARRON, ESQ.
720 20th St., NW
Washington, D.C. 20052

SANFORD N. KATZ, ESQ.
885 Centre Street
Newton Centre, MA 02159

Attorneys for Appellee

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I. When a final decision of a state appellate court in a case terminating the rights of an unwed father upholds the validity of a state statute against federal constitutional attack and remands the case to the trial court on state law issues only and the aggrieved party waits until after trial on remand to seek review of the federal constitutional issues which could have been raised in the earlier appeal and are now raised far outside the 90 day statutory time period for appeal, does this Court have jurisdiction?

II. Are an unwed father's substantive due process rights violated by the termination of his parental rights if state law affords him an opportunity, which he did not grasp, to bring a filiation proceeding (Cal. Civil Code § 7006(c)) which then would have stayed the termination action and prevented the adoption?

III. Does a state's use in a termination of the rights of an unwed father proceeding of a detriment/best interests of the child standard without requiring a specific finding of unfitness on the part of the unwed father violate either equal protection or substantive due process?

IV. If a state makes a distinction between defined presumed fathers and other unwed fathers predicated on distinguishing those biological fathers manifesting unequivocal concern for their offspring and those who have not, does such a distinction violate equal protection?

V. If a state conditions adoption of a newborn on obtaining an unwed mother's consent without requiring such consent from the unwed father in view of the state's concern that providing a veto to equivocal unwed fathers would jeopardize the adoption process and place illegitimate newborns in a placement limbo, is equal protection violated?

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STATEMENT OF CASE

After two months of casual dating, appellant, the unwed father, and PAM[1] stopped seeing each other in November 1980. (R. 26793, R.T. 29.) Sometime during this two-month dating period, PAM became pregnant. Apparently, neither PAM nor appellant was aware of her pregnancy at the time they stopped seeing each other. PAM received no support from appellant during her pregnancy. Appellant and PAM were never married to each other, never attempted to marry each other and never cohabited. (R. 26793, C.T. 17.) Katie[2] was born on July 18, 1981.[3] While in the hospital, PAM requested adoption counseling services from the Adoptions Agency of the Department of Social Services of the County of San Diego ("Adoptions Agency") since she wished to place Katie for adoption. On July 20, 1981, PAM met with Ms. Joan Gray, a social worker with the Adoptions Agency, to discuss possible relinquishment and placement of Katie for adoption. PAM named appellant the father of Katie. At the request of PAM, Katie, age 3 days, was placed in a licensed foster home. The foster home was not that of the proposed adoptive parents. (R. 26793, R.T. 17.)

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[1] For the purposes of confidentiality and privacy the mother will be referred to by her initials "PAM". Appellee has utilized the record citation form as described in footnote 1 on page 1 of the Brief for Appellant.

[2] Katie is the name by which the child is known. At the time of her birth, the baby was known as Baby Girl M. The "M" refers to the surname of PAM; it does not refer to the surname of appellant.

[3] Assuming delivery was full term, conception would have occurred sometime during mid-October, 1980. At the time of conception, appellant was age 34, divorced and had physical, but not legal, custody of his two sons, approximately ages 2 and 4. At the time of the first hearing on December 18, 1981, the two sons were reclaimed by their mother and returned with her to live in northern California.

On August 1, 1981, PAM contacted appellant and told him that she had given birth to Katie. (R. 26793, R.T. 29-30.) PAM informed appellant that he was Katie's biological father. This was his first knowledge of the pregnancy. On August 3, 1981, appellant called Ms. Gray to schedule a meeting to discuss his legal rights as a biological father and to learn about PAM's plans. (R. 26793, R.T. 30.) Appellant met with Ms. Gray on August 5, 1981 (R. 26793, R.T. 9) and stated that the pregnancy came as a surprise to him. He stated that he supposed he was the father of Katie if PAM said he was. Appellant described his relationship with PAM as "casual" (R. 27693, R.T. 9, 32) and, but for one or two telephone calls and a short visit, he had not seen or communicated with PAM since they stopped seeing each other in November, 1980. (R. 27693, R.T. 29.)

At this first meeting, appellant stated *he did not want custody* of Katie because he was single, Katie was a girl and he was responsible for two other children. (R. 27693, R.T. 12.) Instead he wished Katie placed for adoption with a family who were the babysitters for his two children by a former marriage. (R. 27693, R.T. 10.)[4] Appellant asked that PAM be informed of and consider his wishes. (R. 27693, R.T. 10.) Ms. Gray advised appellant that he could relinquish the child for adoption, sign a statement denying paternity, *commence an action to establish the parent-child relationship* or wait until this type of proceeding was filed. (R. 27693, R.T. 31.) (Emphasis supplied.)

PAM was also interviewed on August 5, 1981 by Ms. Gray. After reviewing proposed adoptive placements, including the one suggested by appellant, PAM requested that Katie be placed with one of the families approved by

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[4] It appears that the family suggested by appellant to the Adoptions Agency did not know he had proposed they be allowed to adopt Katie. (R. 27693, R.T. 53.) In any event, this family did not follow through in making any application to adopt. (R. 27693, R.T. 11.)

the Adoptions Agency. On August 5, 1981, PAM signed a relinquishment.[5] (R. 27693, R.T. 10-11.)

Five days later, on August 10, 1981, appellant met with Ms. Gray for a second time. Again, his "legal rights" were discussed and he was informed that PAM had relinquished Katie for adoption. Appellant continued to express *no* interest in seeking custody of the baby himself and was unsure of what was best for the baby. (R. 27693, R.T. 14, 32.) On August 10, 1981, after the second time appellant had stated he did not want custody of Katie, a Petition to Terminate the Rights of a Father (TROF proceeding) was filed pursuant to California Civil Code section 7017.[6] The TROF petition alleged that Katie had been relinquished to the Adoptions Agency; Katie had no presumed father under California law; appellant was the natural father of Katie; and it would be in the best interests of Katie that the rights of appellant be terminated. The TROF petition requested that the trial court terminate the rights of appellant and order that only the consent of PAM was required for the adoption of Katie. (R. 27693, C.T. 1-3.)

On August 17, 1981, seven days after the commencement of the TROF proceeding, appellant met with Ms. Gray for the third time. For the first time, appellant expressed an interest in custody of Katie. He visited with Katie for approximately 30-45 minutes at the Adoptions

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[5] California law permits the father or mother to relinquish a child to a licensed adoptions agency for adoption. (Cal. Civ. Code, § 224.) A relinquishment is a signed, witnessed document which becomes final when filed with the California Department of Social Services. Once final, all parental rights and responsibilities with respect to the child are terminated and the relinquishment may be rescinded only by the mutual consent of the adoptions agency and the parent relinquishing the child. The adoption agency is entitled to the exclusive custody and control of the child at all times until a petition for adoption has been granted. (Cal. Civ. Code, § 224.)

[6] Unless indicated otherwise, all section references hereinafter are to the California Civil Code.

Agency. (R. 27693, R.T. 15, 32.) On August 24, 1981, Katie was placed in the home of Mr. and Mrs. Moses, the proposed adoptive parents. Katie has remained continuously in their home, a period of approximately seven years. On November 11, 1981, appellant again met with Ms. Gray and saw Katie for about 30-45 minutes. (R. 27693, R.T. 15, 32-33.) Appellant told Ms. Gray that he was going to contest the TROF proceeding. (R. 27693, R.T. 15; C.T. 8.)

The TROF proceeding was originally scheduled for hearing on November 16, 1981 but was continued to December 18, 1981. (R. 27693, C.T. 55.) The TROF proceeding was heard before the Honorable Judith McConnell, Judge of the San Diego County Superior Court. Appellant appeared and was represented by counsel. After hearing the evidence, the case was submitted for briefing. On February 9, 1982, the trial court issued its memorandum decision finding that there was no dispute that appellant was the biological father of Katie, that appellant was not a presumed father as defined by California law, and that appellant had failed to prove to the court that it was in the best interests of Katie that appellant be given her custody. The trial court found that only the consent of PAM was required for the adoption of Katie and granted the TROF petition. A judgment terminating the rights of appellant was signed on February 26, 1982. A Notice of Appeal was filed on March 19, 1982.

After a decision by the Court of Appeal reversing and remanding the case to the trial court, the Adoptions Agency sought a hearing in the California Supreme Court. On July 14, 1983, the California Supreme Court granted a hearing[7] and on October 22, 1984, issued its

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[7] Under California law at the time, the opinion of the Court of Appeal was vacated by operation of law on the granting of the Petition for Hearing by the California Supreme Court. (*People v. Rogers* (1978) 21 Cal.3d 542, 547, 146 Cal.Rptr. 732, 579 P.2d 1048.) Therefore, the opinion of the Court of Appeal in *In re Baby Girl M.* (1983) 141 Cal.App.3d 432, 191 Cal.Rptr. 339 does not appear in the official reports.

opinion. (*In re Baby Girl M.* (1984) 37 Cal.3d 65, 207 Cal.Rptr. 309, 688 P.2d 918.) The California Supreme Court noted that the California Legislature in enacting the California version of the Uniform Parentage Act (§ 7000 et seq.) had not specified the standard to be applied in a TROF proceeding. Relying on earlier decisions which had applied section 4600 to various types of custody proceedings (S.A. 8-10), the California Supreme Court concluded that section 4600 applied to all section 7017 proceedings. The California Supreme Court held that a trial court in deciding a TROF proceeding must first consider whether an award to a natural father would be detrimental to the child and then consider whether the termination would be in the best interests of the child. (*In re Baby Girl M., supra,* 37 Cal.3d at 67-68.) The California Supreme Court reviewed the cases of this Court "addressing cognizable interests of unwed fathers" and, while noting that this Court "has not directly considered a fact situation similar to ours," recognized that the California version of the Uniform Parentage Act satisfied federal due process requirements. (*In re Baby Girl M., supra,* 37 Cal.3d at 73-75.)

The California Supreme Court reversed the judgment of the trial court terminating the custodial rights of appellant and remanded the case to the trial court for further proceedings. The California Supreme Court noted that a review of the evidence at the time of the hearing would not have supported a finding of detriment. However, the California Supreme Court stated that because of the passage of time, "further evidence will be necessary . . . [and] circumstances leading to the earlier determination should be reviewed in light of subsequent events." (*Id.* at p. 76.) No appeal or other form of review was taken by appellant to this Court.

The second trial was held on February 25-27, 1985 before Judge McConnell. After hearing the testimony of witnesses and the argument of counsel for all parties, the trial court found that it would be detrimental to give custody of Katie to appellant and that it would be in Katie's best interests that she remain with the Moses family. (J.A. 22-24.) The trial court gave much weight to

the testimony of a child psychiatrist who testified that the removal of Katie from the only home she had ever known would cause extreme psychological and emotional harm to her. (J.A. 13-21.) The trial judge found the evidence "clear and convincing" and held that such harm constituted detriment within the meaning of section 4600. The trial court further found that it would be in the best interests of Katie that custody be awarded to Mr. and Mrs. Moses, who are "in almost every sense the true parents of this child." (J.A. 26-27.)

Appellant appealed the judgment to the Court of Appeal, which, on April 30, 1987, issued its opinion affirming the decision of the trial court. (*In re Baby Girl M.* (1987) 191 Cal.App.3d 786, 236 Cal.Rptr. 660.) A petition for review was filed by appellant in the California Supreme Court. The California Supreme Court denied the petition for review on July 30, 1987 and, at the same time, directed that the opinion of the Court of Appeal not be published in the official reports. (Cal.Const., art. VI, § 4; Cal. Rules of Court, rule 976.)[8] This appeal followed and, by order dated April 18, 1988, this Court postponed decision as to its jurisdiction over this appeal to the hearing on the merits.

SUMMARY OF ARGUMENT

I. This Court has neither appeal jurisdiction nor, in the alternative, certiorari jurisdiction since appellant failed to seek review in a timely manner. Appellant should have appealed the 1984 decision of the California

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[8] At the time this matter was presented a *second* time to the California Supreme Court, the California Constitution had been amended regarding the effect of the California Supreme Court determining to hear a case by granting a Petition for Review. (Cal.Const. art. VI, § 6.) However, since January 1, 1964, the California Supreme Court has had the power to order an opinion of a Court of Appeal not be published in the official reports. As a general rule, neither a court nor a party may cite or rely on an opinion ordered not to be published in the official reports.

Supreme Court to this Court. He chose not to do so. Where a state appellate court in a final decision upholds the validity of state action against a federal constitutional attack and remands the case back to the trial court on state legal issues only, the decision is final under 28 United States Code section 1257(2) and 28 United States Code section 2103. If the aggrieved party waits until after trial on remand to seek review, the party has lost his right to obtain jurisdiction in this Court to decide federal constitutional issues which should have been and could have been raised when the state appellate court first rendered final judgment. (See *Budinich v. Becton Dickinson & Co.*, 100 L.Ed.2d 178, 185, 108 S.Ct. 1717, 1721 (1988).)

II. The California statutes challenged in this case are in full compliance with *Stanley v. Illinois*, 405 U.S. 645 (1972.) In a custody dispute between a parent and a non-parent, California law requires that an award to a non-parent requires two findings: (1) an award of custody to the parent would be detrimental to the child and (2) the award to the non-parent is in the best interests of the child. These findings were made by the California courts in this case and appellant was provided with both notice and an opportunity to be heard with respect to these findings. (See generally, *In re Tricia M.* (1977) 74 Cal.App.3d 125, 132-133, 141 Cal. Rptr. 554, *cert. den.* 435 U.S. 996 (1978); *In re Baby Girl M., supra*, 37 Cal.3d 65, 207 Cal.Rptr. 309, 688 P.2d 911.)

III. Appellant's substantive due process rights were not violated by the termination of his parental rights. In this case, as in *Quilloin v. Walcott*, 434 U.S. 246 (1978), the father had a hearing on his individualized interests in his biological child prior to the entry of the order of termination. A father must quickly seize the opportunity for fatherhood. If the father fails to grasp that opportunity, the federal constitution does not require "a state to listen to his opinion of where the child's best interests lie." (*Lehr v. Robertson*, 463 U.S. 248, 262 (1983).) In this case, the unwed father could have filed an action to establish filiation under section 7006, subdivision (c) as early as August 1, 1981. Such a proceeding would have stayed the

TROF proceeding and could have prevented the adoption. Finally, when considering the substantive due process rights of the unwed father, such consideration is simply part of a total due process assessment: the due process rights of the child, the unwed mother, and the adoptive parents must all be weighed against the custody claims of the unwed father. In evaluating these competing due process rights, the child's due process claims to continue her relationship with the only family she has known, the adoptive parents, must prevail. (*Smith v. O.F.F.E.R.*, 431 U.S. 816 (1977).) The adoptive family which has nurtured Katie has due process rights which corroborate Katie's due process rights to an undisturbed relationship with her legal and real parents, Mr. and Mrs. Moses.

IV. The use of the detriment/best interests of the child standard, even in the absence of a finding of parental unfitness, violates neither the procedural nor substantive due process nor equal protection rights of the unwed father. Appellant contends that it constitutes a denial of equal protection for California to terminate the parental rights of an unwed father without a finding of unfitness since presumed fathers and unwed mothers would not lose their rights absent such a finding. However, lack of fitness is not a federal constitutional requirement for a failure to award custody in these circumstances. In *Stanley v. Illinois* lack of fitness was an essential finding only because Illinois state law made it so. The unfitness/detriment standard which the appellant says should have been applied to him does not have its origin in, nor is it required by, federal constitutional law.

V. The distinction California makes between defined presumed fathers and other fathers is consistent with equal protection. Assuming appellant has lesser rights than presumed fathers, it is appellant rather than the state which is responsible. Appellant could have brought a section 7006, subdivision (c) proceeding to establish the father-child relationship. Insofar as section 7017 creates a distinction between unwed fathers (such as appellant) and other fathers, the policy behind the statute

is that a biological father who has evidenced no concern for his offspring must be differentiated from the biological father who has made manifest his concern. This distinction expedites society's interest in providing newborns with speedy placements in permanent family settings.

VI. Equal protection is not violated if a state conditions adoption of a newborn on obtaining an unwed mother's consent without requiring such consent from an unwed father as well. Unwed fathers and unwed mothers are not similarly situated. The mother bears the child but "the vast majority of unwed fathers have been unknown, unavailable, or simply uninterested." (*Caban v. Mohammed*, 441 U.S. at 398-399 (1978) (Stewart J., dissenting.) The appellant's implicit argument that anything less than absolute gender neutrality in California's adoption and termination laws violates equal protection is in conflict with the decisions of this Court from *Quilloin* to *Lehr*. The gender-based distinction set forth in section 7017 meets an important governmental objective – assuring the timely permanent placement of the illegitimate child through adoption. Judging this classification only by the test of gender neutrality unnecessarily subordinates the rights of the newborn to a placement limbo since even the equivocal, reluctant or indifferent unwed father would thereby have a veto power over adoption and thereby be in a position to jeopardize the viability of the adoption process. Eight states besides California have provided, in their version of the Uniform Parentage Act, that the unwed mother but not the unwed father should have exclusive veto over adoption. The well-considered judgment of California and these states in this regard should be given deference by this Court in view of the historic position of our federalism that family law is a matter for the states and the state courts.

JURISDICTIONAL ARGUMENT

I. This Court Lacks Jurisdiction Since Appellant Failed to File A Timely Notice of Appeal From the Final Decision of the California Supreme Court

Appellant argues this Court has appeal jurisdiction or, in the alternative, certiorari jurisdiction because (1) the California courts determined that the California statutes were not violative of the federal Constitution and that the federal constitutional rights of appellant were not violated and (2) the 1984 decision of the California Supreme Court was not a final judgment and therefore this Court may now consider the federal constitutional issues. (Brief for Appellant pp. 5-6.) Appellant is mistaken. The 1984 decision of the California Supreme Court was a final judgment from which appellant was required to seek review of the federal constitutional issues in this Court.[9]

There is no dispute that the federal constitutional questions raised in this appeal were raised and considered in 1984 by the California Supreme Court in reaching its decision. (*In re Baby Girl M., supra,* 37 Cal.3d 65, 73-75.) *See also: Charleston Federal Savings & Loan Ass'n. v. Alderson,* 324 U.S. 182, 185-186; *In re Baby Girl M., supra,* 191 Cal. App. 3d 786-791, fn.2.) There is also no question that *at that time* this Court had jurisdiction to review that decision. (*Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).) This case was ripe for review since the California Supreme Court had held that section 7017 permitted the parental rights of an unwed father to be terminated upon a showing that an award of custody to the unwed father would be detrimental to the child and that an award

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[9] There is no question that there is a final judgment at this time terminating the rights of appellent as a result of the second trial and appeal through the California courts which affirmed the judgment of the trial court. However, since appellant failed to timely seek review in this Court, this appeal of the final judgment involves only matters of state law.

of custody to a nonparent would be in the best interest of the child. In reaching its decision, the California Supreme Court concluded that (1) section 7017 was constitutional under federal law and (2) that a termination under section 7017 would not violate any federal constitutional rights of the appellant. The federal constitutional issues had been raised and finally decided against appellant. The 1984 decision of the California Supreme Court became final on November 21, 1984, 30 days after filing of the decision. (Cal. Rules of Court, Rule 24(a).) Appellant sought no review. However, *now* recognizing this jurisdictional defect, appellant seeks to avoid this bar by contending that the 1984 decision of the California Supreme Court was not a final judgment subject to appeal jurisdiction since the case was remanded to the trial court for further proceedings on state law. This contention is incorrect.

The failure of a party to file a notice of appeal within the statutory time limit prescribed by Congress is a jurisdictional defect. (*Territo v. United States,* 358 U.S. 279 (1959); *Ward v. Winstead,* 400 U.S. 1019 (1971).) An appeal of a judgment of a state court must be taken within 90 days of the entry of the judgment or order in the state court. (28 U.S.C., § 2101(c).) There are no statutory exceptions to this time limit requirement. Appellee contends that under both the congressional statutes prescribing the jurisdiction of this Court and the prior decisions of this Court, the 1984 decision was a final decision from which appellant was required to seek review. The filing of an appeal on October 28, 1987, some *four years after* the 1984 decision, is outside the statutory 90-day time period and, as a result, this Court lacks jurisdiction.

The limitations on the appellate jurisdiction of this Court were exhaustively discussed in *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. 469. In *Cox Broadcasting,* the Georgia Supreme Court had held that a criminal statute making it unlawful to publish the name of a rape victim was constitutional but did not give a civil remedy to those injured by its violation. The Georgia Supreme Court

held that the complaint stated a cause of action for invasion of privacy under common law which was not precluded as a matter of law by the First Amendment. The Georgia Supreme Court remanded the case to the trial court. However, the decision of the Georgia Supreme Court was appealed to this Court. The jurisdiction of this Court to hear the case was challenged on two grounds: (1) whether the constitutional validity of the state statute had been "drawn into question" and (2) whether the decision of the Georgia Supreme Court from which the appeal has been taken was a "[f]inal judgment or decree." (28 U.S.C., § 1257(2).) Insofar as pertinent to this case, Justice White described at least four categories of cases where in the context of the finality provision an appeal could be heard. (*Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. 469, 477-478.) This case comes within the principle behind these categories. This is a case in which further proceedings were to occur in a state trial court but where the federal issues had been conclusively decided and the "further proceedings cannot remove or otherwise affect" these federal issues. (*New York v. Cathedral Academy,* 434 U.S. 125, 128, fn. 4 (1977).) The case was remanded solely on a state issue of statutory interpretation. Under such circumstances the principles enunciated in *Cox Broadcasting* apply and the 1984 decision was a final judgment. Most recently, this Court, in an opinion by Justice Stevens, concluded that the decision of the Mississippi Supreme Court, which held that federal law did not preempt a state regulatory agency from exercising its jurisdiction and remanded the case back to the state regulatory agency for further proceedings, was a final decision by the Mississippi Supreme Court on the "critical federal question . . . [and] is therefore ripe for review." (*Mississippi Power & Light Company v. Mississippi,* 108 S.Ct. 2428, 2438, fn. 11 (1988).)

The justifications for the finality doctrine – "efficiency, judicial restraint, and federalism" – are served by concluding that the attempt of appellant to review the federal questions decided in the 1984 decision by appealing from the 1987 decision is ineffective. (*Dickinson v.*

Petroleum Conversion Corp., 338 U.S. 507 (1950).) This Court should be particularly sensitive to the impact of "delayed justice" in child custody or adoption cases.

There is absolutely no legitimate reason given by appellant for his failure to appeal the 1984 decision to this Court. Appellant chose to play a brand of "Russian Roulette" – that was his choice, his right and his risk. Neither the Adoptions Agency, Katie or the proposed adoptive parents had any right to seek review in this Court of the 1984 decision since they were aggrieved only on the state law issues, not on the federal constitutional issues. (See 28 U.S.C., § 1257(2) and 28 U.S.C., § 2103.) It is these parties who specifically suffer from the unexcused failure of appellant to pursue his appeal rights in a timely manner. Like his failure to seize timely the opportunity to seek custody of Katie, appellant failed to seize the opportunity to appeal the federal constitutional issues to this Court in a timely fashion.

A determination by this Court that appellant should have pursued his appeal in 1984 would mirror the concern expressed by this Court that extended uncertainty in state custody decisions is "detrimental to a child's development." (*Lehman v. Lycoming County Children's Services,* 458 U.S. 501, 513 (1982).) This Court has recognized that it should seek a practical approach to preserve "operational consistency and predictability in the overall application" of the finality rule for purposes of appeal. (See e.g., *Budinich v. Becton Dickinson & Co.,* 100 L.Ed.2d 178, 185, 108 S.Ct. 1717, 1721 (1988) (Scalia, J.).) Appellant should not be rewarded for his waiting game any more than he should be rewarded for his indecisiveness in 1981. Review of the 1984 decision would not have offended the objection to piecemeal review or been harmful to the trial process. (*North Dakota Pharmacy Board v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 163 (1973).[10]

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[10] This court has recognized the "exceptional need for finality in child-custody disputes." (*Lehman v. Lycoming County Children's Service, supra,* 458 U.S. 502, 512.)

A judgment is either final for purposes of invoking the jurisdiction of this Court or it is not. If the 1984 decision was final then this appeal is too late. This Court has recognized that "[c]ourts and litigants are best served by the 'bright-line rule' which clearly establishes the time of appealability where it has jurisdictional consequences." (*Budinich v. Becton Dickinson & Co., supra,* 108 S.Ct. 1717, 1722 (Scalia, J.).) The "bright-line rule" in this type of case should be as follows: where the "final" decision of a state appellate court in a child custody or adoption case upholds the validity of a state statute or procedure against a federal constitutional challenge and remands the case back to the trial court on state law issues, the decision is final for purposes of appeal or certiorari, and the aggrieved party must seek timely review from that decision in order for this Court to have jurisdiction. If the aggrieved party waits until after trial on remand to seek review, this Court lacks jurisdiction to hear and decide any federal constitutional issues which could have been raised and determined in the earlier appeal. Appellant is on the wrong side of the "bright-line" and his appeal should be dismissed.

II. The California Statutes are in Full Compliance With the Requirements of *Stanley v. Illinois* and Provide An Unwed Father Ample Opportunity to Develop and Establish A Relationship With His Child

A. Uniform Parentage Act: California Version.

It has been long established in California that the consent of the parents of a child lies at the foundation of proceedings for adoption. (§ 224; *Adoption of McDonald* (1954) 43 Cal.2d 447, 452-453, 274 P.2d 860.) The purpose of adoption statutes is the promotion of the expeditious placement of children in a permanent home where there is continuity of care with nurturing parents. Traditionally, the statutes of California distinguished between a legitimate child and an illegitimate child as to the right to custody and the need for parental consent in adoption proceedings. Thus, in the case of an illegitimate child,

only the consent of the natural mother was required by statute. (See, *Adoption of Irby* (1964) 226 Cal.App.2d 238, 241-242, 37 Cal.Rptr. 879.) However, as a result of decisions of this Court, questions were raised regarding the validity of statutes permitting the adoption of an illegitimate child without some form of notice to the natural father of the illegitimate child. (See e.g., *Stanley v. Illinois,* 405 U.S. 645 (1972); *Rothstein v. Lutheran Social Services of Wisconsin and Upper Michigan,* 405 U.S. 1051 (1972); *Vanderlaan v. Vanderlaan,* 405 U.S. 1051 (1972).)

In part because of the *Stanley* decision, the California Legislature enacted the California version of the Uniform Parentage Act (hereinafter "the Act").[11] (§ 7000, et seq; Cal. Stats. 1975, ch. 1244, § 11.) The major purpose of the Act is to provide for substantive legal equality of children regardless of the marital status of their parents. In place of the previous distinction between "legitimate" and "illegitimate" as legal labels for children based upon the marital status of the child's parents, the Act has substituted a legal concept called the "parent and child relationship." (§ 7002.) This relationship may exist between a

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[11] The California version differs in some respects from the provisions of the Uniform Parentage Act (UPA) as approved in 1973 by the National Conference of Commissioners of Uniform State Laws in 1973. (See Review of Selected 1975 California Legislation, 7 Pacific L.J. 412, 416-419 (1976).) The UPA has been enacted in 17 states: Alabama (Code 1975, §§ 26-17-1 to 26-17-21); California (West's Ann. Cal.Civ.Code, §§ 7000 to 7018); Colorado (C.R.S., 19-4-101 to 19-4-129); Delaware (13 Del.C. §§ 801 to 818); Hawaii (HRS §§ 584-1 to 584-26); Illinois (S.H.A. ch. 40, ¶¶ 2501 to 2526); Kansas (K.S.A. 38-1110 to 38-1129); Minnesota (M.S.A. §§ 257.51 to 257.74); Missouri (V.A.M.S. §§ 210.817 to 210.852); Montana (MCA 40-6-101 to 40-6-135); Nevada (NRS 126.011 to 126.391) New Jersey (N.J.S.A. 9:17-38 to 9:17-59); North Dakota (NDCC 14-17-01 to 14-17-26); Ohio (R.C. §§ 3111.01 to 3111.19); Rhode Island (Gen.Laws 1956, §§ 15-8-1 to 15-8-27); Washington (West's RCWA 26.26.010 to 26.26.905); and Wyoming (W.S.1977, §§ 14-2-101 to 14-2-120). (See 9B Uniform Laws Annotated, Master ed., Uniform Parentage Act, p. 287.)

child and his or her natural or adoptive parents and may be established under the Act. (§ 7003.) Thus, the Act abolishes the concept of illegitimacy and substitutes the concept of parentage as the basis for determining rights.

Insofar as applicable to this case, the basic provision of the Act governing TROF proceedings is found in section 7017 which, at all the relevant times in this case, provided as follows:

1. Where there is a "presumed natural father" (or a "legitimate" father pursuant to repealed § 230) and the mother "relinquishes or consents to or proposes to relinquish" the child for adoption, the presumed natural father has the right to notice of the adoption and his consent to it is required except as provided in section 224. (See, § 7017, subd. (a).)

2. Where, however, there is no "presumed natural father" (or no "legitimate" father pursuant to repealed § 230) and the conditions of 1 above are met, a TROF proceeding must be filed to terminate the rights of the natural father. If a natural father fails to appear, or does appear but fails "to claim custodial rights," the court *shall* terminate his parental rights, and order that only the consent of the mother shall be required for the child's adoption. This is true unless the court finds the man is a presumed natural father under section 7004, subdivision (a), in which case the court must order that the consent of the natural father is required for adoption. (§ 7017, subd. (d).) If a natural father appears and claims custody, the court shall proceed to determine parentage of and custodial rights to the child.[12]

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[12] Appellant *misstates* the law applicable to this case. Appellant references section 7017, subdivision (d)(2) on pages 3, 5, 8, 11, 13, 18, 26, 31 and 33 of the Brief for Appellant as the primary statutory provision involved in this case. However, there was *no* subdivision (d)(2) until it was enacted by the Legislature in 1986. (Cal. Stats. 1986, ch. 1370, § 2.) (S.A. 4-8.) These amendments did not take effect until January 1, 1987. The appropriate reference is to section 7017,

(Continued on following page)

The Act provides that notice of the TROF proceeding must be given to all possible natural fathers. (§ 7017, subd. (f).) The hearing in a TROF proceeding is closed and, other than the final judgment, the records of the TROF proceeding are confidential. (§ 7014.)

B. California Version of the Uniform Parentage Act: California Judicial Decisions

In determining the rights of unwed fathers, the California version of the Act distinguishes between a "presumed father" and one who is merely a "natural father." As previously noted, a "presumed father" is one who generally has or has attempted to marry the mother of the child or who has received the child into his home, and openly held out the child as his natural child. (§ 7004). The consent of a presumed father is essential to an adoption. (§ 7017, subd. (d).)

A TROF proceeding is ancillary to the adoption process. (*In re Baby Girl M., supra*, 37 Cal.3d 65, 76; § 7017.) The procedures established by the Act meet the constitutional procedural requirements of notice and opportunity to be heard. (*In re Tricia M.*, (1977), 74 Cal.App.3d 125, 132-133.) If a natural father appears and claims custody, the trial court proceeds to determine parentage and custodial rights in whatever order the trial court deems proper. Thus the trial court has discretion to consider custody *before* reaching an ultimate conclusion of parentage. For example, an unwed father worthy of and desiring custody may be blocked in his efforts to obtain custody because the mother refuses to permit him the opportunity to have the child. But the trial court may, in a proper case, grant him custody, allow him to complete the conduct necessary under section 7004, subdivision

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subdivision (d). (Cal. Stats. 1979, ch. 752, § 3.) (S.A. 1-4.) It is of interest to note that the 1986 amendment establishes the best interests of the child standard used by the trial judge in the 1981 trial.

(a)(4) to establish himself as a presumed father, and then make the appropriate order. On the other hand, the unwed father who has shown no previous interest in providing a family atmosphere for his child should not be allowed to withhold consent and block a speedy adoption. This would be in the child's best interests unless he can show his action will now result in a custodial arrangement serving the best interests of the child. (*In re Tricia M., supra,* 74 Cal.App.3d 125, 133-134.)

Prior to 1969, California adhered to the principle that a trial court must award physical custody of a minor to a parent, if fit to exercise custody, as against a stranger. This principle rested on a theory that the right of a parent in his child was similar to that of a property owner in his chattel. (*In re Campbell* (1900) 130 Cal. 380, 382, 62 P. 613.) In 1969, the California Legislature enacted the Family Law Act of 1969 (§ 4000, et seq.) which included section 4600. The Family Law Act eliminated the standard of unfitness in custody proceedings between a parent and non-parent and created a new standard which required a court to make a finding that an award of custody of a child to a parent would be "detrimental to the child" and that an award of custody to a nonparent was required to serve the best interests of the child before custody could be awarded to a non-parent. (*In re B.G.* (1974) 11 Cal.3d 679, 698-699 114 Cal.Rptr. 444, 457-458, 523 P.2d 244, 257-258.) This new standard was determined to apply to the custody issue in a TROF proceeding. (*In re Baby Girl M., supra,* 37 Cal.3d 65.)

The determination that an award of custody to a parent would be detrimental to a child is not the same as a finding of unfitness that would permit the state to intervene and remove a child from a parent or family who has custody of a child. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 795, fn. 7, 218 Cal.Rptr. 39, 705 P.2d 362.) The California statutes as written and as construed by the California courts provide a natural father with both notice and the opportunity to be heard *and* the

opportunity to develop and establish a parent-child relationship.[13]

III. Appellant's Substantive Due Process Rights Were Not Violated By the Termination of His Parental Rights

In this case, as in *Quilloin v. Walcott,* 434 U.S. 246 (1977), insofar as the unwed father has due process arguments, those arguments are substantive rather than procedural in nature. As in *Quilloin,* the father here received notice of the TROF proceeding. Again as in *Quilloin,* he had a hearing on "his individualized interests in his child, prior to the entry of the order of . . . adoption." (Id. at p. 253.) Although *Stanley* is cited throughout appellant's brief, it is not relevant to this proceeding. *Stanley* has had great influence with respect to the procedural due process rights of the natural father, rights which were granted to appellant under the California statutory scheme. The requirements of procedural due process, as set forth in *Stanley,* have been satisfied in this case.[14]

Appellant contends that he has a protected liberty interest to raise his natural child. (Brief for Appellant, pp. 20-21.) Appellant concedes, on the authority of *Lehr v. Robertson,* 463 U.S. 248, 261-262 (1983), that a "full commitment to fatherhood" is necessary to confer substantive due process protection on the unwed father's interest in his biological child. Further, appellant contends that he has demonstrated a "full commitment" to the responsibilities of parenthood. (Brief for Appellant, p. 24.) The reasons that the substantive due process rights of the appellant were not violated are very similar to the

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[13] This Court is bound by the construction given a state statute by the highest court of the state. (*Guaranty Trust Co. v. Blodgett,* 287 U.S. 509, 512-513 (1933).)

[14] *Stanley,* of course, is also concerned with the substantive due process rights of the unwed father but again is not relevant in this case since it is concerned with a father who lived with and reared his children.

reasons set forth by this Court in *Quilloin v. Walcott, supra*, for rejecting identical contentions there. In *Quilloin*, as here, the "best interests of the child" standard was applied.[15] In *Quilloin*, as here, the child had never been in the father's custody. Justice Marshall for the Court in *Quilloin* set forth the reasons for rejecting the unwed father's substantive due process contentions:

> "But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, was in the 'best interests of the child.'" (Id. at p. 255.)

In *Quilloin*, the Court gave full recognition "to a family unit already in existence." In this case, the family unit was and remains Katie and Mr. and Mrs. Moses. This is the only family that Katie has ever known. This case presents the question: Which family unit should be preserved? That unit which now exists – the relationship of Katie with the Moses family? Or, should a new relationship be established whose creation is fraught with emotional and psychological risks to Katie? (See J. Goldstein, A. Freud, A. Solnit, *Beyond the Best Interests of the Child* 3-8 (1979).)

Professor Laurence Tribe has made an analysis of *Quilloin* which is highly relevant to the facts of this case.

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[15] The California Supreme Court determined that as a matter of state law a detriment/best interests of the child standard applied to TROF proceedings. (*In re Baby Girl M., supra*, 37 Cal.3d 65, 69-70.)

His analysis emphasizes the desirability of preserving a "complete" if non-biological family relationship rather than risk its destruction by acceding to the claims of an exclusively biological relationship. (See Tribe, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988) p. 1417, fn. 24.)

Unlike *Quilloin*, in this case, appellant did at one point after the newborn's birth, ask not for custody but for a disposition which would give him access to the child. This factor is diminished by the fact that, when first confronted with the fact of Katie's birth, he did not wish custody. Does the belated request for custody without more demonstrate a "full commitment" to parenthood sufficient to distinguish *Quilloin's* rejection of substantive due process claims in very similar circumstances? We think not.

Quilloin stands for the proposition that there is a difference between siring a child and nurturing a child. In *Stanley* where due process was held to require notice to the unwed father, the father in that case was one who had done far more than merely siring a child. He had been a participant in the rearing of the children. In *Caban v. Mohammed*, 441 U.S. 380 (1979), the unwed father had also nurtured the children.

Siring a child alone is not enough to give an unwed father a protected liberty interest. Neither is a bare request for custody enough. The father must seize the opportunity for fatherhood.

What constitutes such seizure of opportunity? *Lehr v. Robertson*, 463 U.S. 248 (1983), sheds some helpful light on this question. In *Lehr*, the mother married a man, not the father of her child, eight months after the birth of the child. When the child was over two years old, the married couple filed a petition to adopt the child which was granted. The child's father had, to that point, neither supported nor lived with the child nor did he file any notice of intent to claim paternity as provided for under New York law.

Later the father did file a petition seeking paternity and rights of visitation. The father's principal objection in *Lehr* was that the adoption was granted without notice to

him. The father, Jonathan Lehr, contended that the grant of the adoption petition without notice to him offended both equal protection and due process. The Court, per Justice Stevens, emphasized the importance of distinguishing between "the developed parent-child relationship that was implicated in *Stanley* and *Caban* and the potential relationship involved in *Quilloin* and this case." (*Id.* at p. 261.) This case, like *Quilloin* and *Lehr*, is also a case involving a potential relationship. The commitment to fatherhood of the natural fathers in *Stanley* and *Caban* had created for them an interest in continuing personal contact with their children, which entitled them to "substantial protection under the Due Process Clause." (*Id.* at p. 261.) Potential relationships are in a different due process category. As Justice Stevens put it: "But the mere existence of a biological link does not merit equivalent constitutional protection." (*Id.* at p. 261.)

Professor Homer Clark, one of the nation's leading scholars in the law of domestic relations, analyzes *Stanley* and *Lehr*, and concludes: " . . . that where the father has persistently and consistently supported and cared for the child, he must be given notice if his parental rights or rights to custody may be cut off." (See Clark, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, p. 860, Student's edition, (2d ed. 1988).)

Professor Clark then goes on to describe the precise issues in this case:

> "But *Lehr* gives us no clues as to how much of a relationship is enough to entitle the father to veto an adoption or have notice of the adoption petition. The *Lehr* case also leaves unanswered the question of the father's rights respecting adoption placements of newborn children." (*Id.* at p. 861.)

Professor Clark recognizes the problem of the unwed father and the newborn. He nonetheless cites approvingly *Wells v. Children's Aid Society of Utah*, 681 P.2d 199 (Utah 1984), holding that a Utah termination of parental rights statute which required the unwed father to file an acknowledgment of paternity prior to the time the child

is released to an adoption agency did not offend substantive due process. In the *Wells* case, the father's complaint alleged that Children's Aid Society and (the unwed mother) "had fraudulently concealed the facts surrounding the infant's birth to deprive him of his parental rights." (*Id.* at p. 201.) It is, of course, the appellant's contention in this proceeding that the state and the unwed mother similarly acted together to deprive him of a parental relationship. (See Appellant's Jurisdictional Statement, p. 10.) This argument ignores the facts that appellant was advised of his legal alternatives during his first meeting with Ms. Gray; he had the opportunity to consult with friends and others after he first learned of Katie's birth; and he had the advice of legal counsel throughout these proceedings.[16] In *Wells*, the father had not acknowledged paternity as provided for in the Utah procedure until the day before the mother relinquished the child to Children's Aid. At the termination of parental rights proceeding, the Utah trial court held that the state termination of parental rights statute could not constitutionally be applied to him because he was "'denied a reasonable opportunity to file his acknowledgment of paternity prior to placement of the child by Children's Aid Society.'" (681 P.2d 199 at 202.) The trial court conceded that the unwed father "did not make a timely filing of his acknowledgment of paternity as required by sec. 78-30-4(3)(b)." (*Id.*) The Supreme Court of Utah reversed and held that its termination of parental rights statute was constitutional. The court reached this result even though it agreed that its statute must meet a stringent standard of review. (*Id.* at p. 205.) The strong state

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[16] It should be noted that appellant made no effort to determine if PAM was pregnant as a result of their sexual relationship. The birth of Katie was a surprise to him. To Justice Mosk, appellant might be a "casual inseminator". (*Michael U. v. Jamie B., supra*, 39 Cal.3d 787, 797 (Mosk, J. concurring.)

interest behind the Utah termination of parental rights statute was described as follows:

> "The state's strong interest in immediate and secure adoptions provides a sufficient justification for significant variations in the paternal rights of unwed fathers, who, in contrast to mothers, are not automatically identified by virtue of their role in the process of birth." (*Id.* at 203.)

The *Wells* court found its statute consistent with the constitutional standards of *Lehr*. *Lehr*, it will be recalled, spoke of the need for the father to grasp the opportunity for fatherhood. Biology offers the father that opportunity. But he must accept "some measure of responsibility for the child's future." (463 U.S. 248 at 262.) In *Lehr* the remedy open to the unwed father was described by the Court as follows:

> "The State of New York maintains a 'putative father registry.' A man who files with that registry demonstrates his intent to claim paternity of a child born out of wedlock and is therefore entitled to receive notice of any proceeding to adopt that child." (463 U.S. 248 at 250-251.)

The father in *Lehr* failed to file in the putative father registry. If the father fails to grasp that opportunity, "the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." (463 U.S. 248 at 262.) In *Wells*, in *Lehr*, and in this proceeding, the unwed father did not grasp the earliest opportunity to assert fatherhood and a desire for custody. At his first meeting with the social worker in *Wells*, the unwed father was "equivocal, never indicating positively whether or not he desired to assert his parental rights." (681 P.2d 199 at 202.) Appellant is in a similar position here. The unwed father in *Wells* said on September 17, that he did not know whether he wanted the child; on September 23rd, he decided he wished to claim paternity. The father in this case was and is similarly equivocal. Even now he does not ask for custody nor did he at the child's birth. The reasons the opportunity of which *Lehr* speaks must be quickly grasped are described

in what Professor Clark quite correctly calls the "well-reasoned" decision in *Wells*. (*Clark, supra,* at p. 861.) The state interest in "speedily identifying those persons who will assume the parental role" over illegitimate newborns is very strong because "immediate and physical care" must be assured but the state must also facilitate "early and uninterrupted bonding of a child to its parents." (681 P.2d 199 at 203.) Appellee submits that exactly the same kind of considerations which promoted the Utah Supreme Court to conclude that its statute satisfied *Lehr* justify a conclusion that section 7017 is also valid and consistent with the standards of substantive due process.

The opportunity for fatherhood must be quickly grasped. Lest it be thought that this is too severe a doctrine as far as the rights of the unwed father are concerned, it is interesting to note that even the most ardent proponents of the rights of the unwed father recognized that there are other important considerations in the due process mix that must be heeded – the rights and best interests of the child. (See *Buchanan, The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson,* 45 Ohio State Law Journal 313 at 377 (1984).)

The French philosopher, Rousseau, said: "A father has no right to be a father if he cannot fulfill a father's duties." (Jean-Jacques Rousseau, *Confessions,* (Penguin ed. 1953).) When confronting the dilemma of protecting the due process rights of both the illegitimate child and the unwed father, the extent to which the father has effectively seized the opportunity to establish fatherhood which the state, in this case California, has provided must be examined.

Appellant *misstates* his rights under the Act when he argues his "inability to initiate a proceeding to establish his paternity and get custody or visitation." (Brief for Appellant p. 8.) In the case of an unwed father, such as appellant, the Act provides two methods for determining the father and child relationship: (1) by proof of one of the criteria which establishes the presumption of the relationship; or (2) by a legal action which results in a judicial determination of the existence or non-existence of

the relationship. (§ 7004.) At the time Katie was conceived and born and the TROF proceeding was commenced and pending section 7006 provided:

> "(c) *An action to determine the existence of the father and child relationship* with respect to a child who has no presumed father under section 7004 or whose presumed father is deceased *may be brought by* the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, *a man alleged or alleging himself to be the father,* or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. *The commencement of such an action shall suspend any pending proceeding in connection with the adoption of such child, including a proceeding pursuant to subdivision (b) of Section 7017, until a judgment in the action is final."* (Emphasis added)[17] (S.A. 10-12.)

In this case, appellant could have brought a proceeding under section 7006 to establish fatherhood as early as August 1, 1981, when he first learned of the birth of Katie. Bringing such a proceeding would have stayed the TROF proceeding. If this had been done, the adoptive placement would have been jeopardized and, if successful, the adoption itself would not have been possible. If the appellant had been successful in the filiation proceeding he would have been a "presumed father" under California law and would have had, as does the

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[17] The 1986 amendment to section 7006 provided that an action commenced under section 7006 was to be consolidated with an adoption proceeding under section 7017, subdivision (b) instead of suspending adoption proceedings, and provided that the alleged natural father's rights be determined pursuant to section 7017, subdivision (d). (Cal. Stats. 1986, ch. 1408.) (S.A. 12-14.) The 1987 amendment inserted, in the second sentence of subdivision (c), "if a proceeding has been filed under section 7017." (Cal. Stats. 1987, ch. 114.) However, the 1986 and 1987 amendments are not applicable to this case since the second trial was concluded in February 1985.

mother, a veto over an adoption. In short, the due process rights that appellant insists on here were in fact afforded and available to him by California and were lost not as a result of any state action but as a result of his own indecisiveness and inaction.

Finally, in analyzing the due process issues in this case, it is very important to make clear what this case is about. This case concerns the placement of a child whose unwed father was equivocal about her future and whose unwed mother was not. The unwed mother sought to place Katie with an identifiable adoptive couple, Mr. and Mrs. Moses. This family had been selected and found suitable for adoptive placement by a licensed state adoption agency. This case is *not* about the state taking a child away from a father on the basis of neglect when that father has had continuous or any custody of the child for purposes of placing the child in a foster care system. Appellant cites some articles by several legal writers as if those articles are applicable to this proceeding, (see Brief for Appellant, pp. 38-39), but these articles are about state intervention and neglect proceedings. Insofar as these articles relate to this case, the principle of preservation of the family, for which these writers argue, supports appellee rather than appellant.

Another issue that should be discussed in the context of this case is – how should the statement of the trial court judge that appellant was a "capable parent to his boys" (J.A. 7-8) be evaluated? In a *constitutional* sense, it is simply part of the due process evaluation: The due process rights of the child, reflected as they are in the best interests standard, are weighed against the custody claims of the father. It is important to understand what the term fitness means in the field of family law. It means that a person has the ability to promote the physical and psychological well-being of the child at the time of the custody dispute. From a practical vantage point, this means that the court has to weigh the child's present relationships and the effect any change will have on those relationships. (See generally, Goldstein, Freud, and Solnit, *Beyond the Best Interests of the Child* (1979).) This is

precisely what the trial court in California did each time this difficult choice was presented. In each case, weighing these competing interests the trial court decided against the appellant.

Appellant does not even appear to recognize that the due process claims of the unwed father might conflict with the due process rights of the child. (See Brief for Appellant, pp. 21-22, fn. 6.) Indeed, this case implicates a number of rival due process claims: those of PAM, appellant, Katie and the Moses family.

In a recent comment (see Belliston, *The Putative Father's Due Process Rights to Notice and a Hearing*, 1986 Brigham Young L.Rev. 1081), the unwed mother's interest is described as follows:

> "The decision to give up (the child) for adoption is almost always a difficult one, made possible only by the mother's conviction that she is doing what is best for the child. For many unwed mothers, knowing that the child's father might successfully challenge the adoption could make her decision traumatic." (*Id.* at p. 1094.)

Indeed, it has been suggested that "mothers will keep their babies if there is any uncertainty surrounding immediate and final adoptive placement." In addition, if the mother retains custody under such circumstances, concern has been expressed that "the child will very likely be harmed." (*Id.* at p. 1094, fn. 47; also see *Sylander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1112 (1st Cir. 1978).)

The adoptive parents also have due process rights which merit consideration.[18] In *Smith v. O.F.F.E.R.* 431 U.S. 816, 843 (1977), which involved the issue of whether state procedures to remove foster children from foster parents complied with due process standards, the Court suggested that foster parents had some due process rights even though they were not the biological parents.

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[18] The adoptive placement by the Adoptions Agency was occurred on August 24, 1981. The San Diego County Superior Court entered an adoption decree on August 7, 1987.

Justice Brennan said for the Court: "A biological relationship is not present in the case of the usual foster family. But biological relationships are not exclusive determination of the existence of a family." (*Id.*)

In the *Smith* case, the Court made clear that the "liberty" interests of the foster parents were subordinate to the "liberty" interests of the natural parents: "In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional 'liberty' in the foster family." (*Id.* at p. 846.) This passage has a dual implication for this case. First, some "liberty" interest was recognized even for foster parents against the claims of natural parents who had had custody in the past. Second, if foster parents have a constitutionally protected "liberty" interest, the "liberty" interest, under the due process clause of the Fourteenth Amendment, of adoptive parents with legal custody must, by definition, be even stronger.

Substantive due process "bars certain arbitrary government actions regardless of the fairness of the proceedings used to implement them". (*Daniels v. Williams*, 474 U.S. 327, 337 (1986) [Stevens, J. concurring].) In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court charted the course of substantive due process doctrine insofar as it bore on protected family relationships. Thus, Justice Powell in the plurality opinion for the Court in *Moore* quoted approvingly from *Prince v. Massachusetts*, 321 U.S. 158 at 166 (1944) that "a host of cases" had "consistently acknowledged a 'private realm of family life which the state cannot enter.' " (*Id.*, at p. 499.) The origins of this doctrine lie in *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925). Those cases, like *Stanley v. Illinois*, 405 U.S. 645 (1972), assume an established parent-child relationship. In this case, however, there is no established parent-child relationship between this appellant unwed father and Katie. The appellant unwed father contends that the state cut off his opportunity to develop that

relationship. In fact, appellant here had such an opportunity and failed to avail himself of it. But, as was developed earlier, there are other due process rights which must be considered. As far as Katie who is the center of this controversy is concerned, the parent-child relationship which is fundamental to her existence is her relationship with her adoptive parents, the Moses family.

In *Moore*, the Court held that a municipal ordinance which in effect limited occupancy of a dwelling unit to members of a nuclear family was a violation of substantive due process. *Moore* holds that the family unit that is protected under the due process clause extends beyond the nuclear biological family. This supports the position of the appellee and the adoptive parents in this case.

This case raises the question of identifying the family unit and the parental relationships which should be accorded due process protection. Should a "family" unit now be fabricated by the state to provide visitation rights for the appellant? Or should the long-standing family unit the state has created, the relationship between Katie and the Moses family, be preserved?

Professor Tribe has urged that the emphasis of the plurality in *Moore* "upon the blood relationship of the parties should not be treated as decisive." He writes: "The functions shaping and transmitting values, which the *Moore* plurality identified as justifying protection for the extended family, inhere in a wide variety of enduring relationships; government interference with any such relationship should be invalidated unless compellingly justified." (See Tribe, AMERICAN CONSTITUTIONAL LAW, p. 1420 (2d ed. 1988).)

This reasoning has direct application to this proceeding. The adoptive family which has nurtured this child has due process rights even though they are not blood relatives of that child; they are the child's legal and real parents. The family unit represented by the Moses family and Katie cannot be held hostage to the appellant's belated desire for a modified kind of paternity. The substantive due process claim of this unwed father can only be recognized by ignoring the substantive due process

claims of those who have willingly and unreservedly sought out the responsibilities of parenthood which even now, as this appellant candidly avows, he does not desire to fully assume. (Brief for Appellant, p. 22, fn. 6)

And what of the due process rights of the child? Although in cases such as this, it is the father's complaints which are before the court, "the most important interests to be considered are probably those of the child." (*Id.* at p. 1094.) Thus, the difficult task of resolving competing due process claims is presented. Corollary issues arise such as whether the child's interest should be accorded distinct due process protection and whether amidst these competing claims of adoptive parents and unwed father, the due process rights of the child should be given the greatest weight.

This Court has spoken of "the paramount interest in the welfare of children." (See *Lehr v. Robertson*, 463 U.S. 248, 257 (1983).) *Lehr* also said at the same time "that the rights of the parents are a counterpart of the responsibilities they have assumed." (*Id.*)

Consideration of the due process interests of the child do not, of course, mean that the due process interests of the unwed father should not also be evaluated. The fundamental point is the child must be part of the total due process assessment when due process rights are considered: "But the state may consider the interests of the child – without reference to the prospective parents – in determining how much protection the father must have." (See 1986 B.Y.L.Rev. 1081 at 1094.) In this context, once the adoptive placement has been made – as in this case – the child's best interests are "probably served by leaving him in the adoptive home." (*Id.* at 1095; see Goldstein, Freud, and Solnit, *Beyond the Best Interests of the Child* 36 (1979).)

Appellant argues that he has a constitutionally protected parental interest. Yet he does not seek parenthood; even now he concedes he "does not demand immediate custody." (Brief for Appellant, p. 22, fn. 6.) Appellant argues that he should in these circumstances have "a

right to further develop the relationship." (*Id.*) This contention is made with no awareness that this might have adverse consequences for a child who has for all her seven years known only her adoptive parents. At the same time appellant says this, he hints at future litigation suggesting that someday he may seek custody, i.e., "[i]f it is best for the child to be in someone else's custody, *at least for the present*." (*Id.*)

When due process rights collide, the rights of just one of the parties to that conflict cannot be considered *in vacuo*. In this situation, as in the foster parent situation in *Smith*, it must be recognized that the "claim to a constitutionally protected liberty interest raises complex and novel questions." (*Smith v. O.F.F.E.R., supra,* 431 U.S. 816, 847.)

The California trial court which was the fact-finder in this proceeding has shown an understandable reluctance to disrupt the only family this child has known, i.e., the adoptive family. Indeed, this concern for the child's stable and permanent placement explains why California requires the unwed father of the newborn to take one of several prescribed initial statutory steps to put himself in a "presumed father" category. It also helps to explain why California's statutory scheme, under section 7017, does not give the father a veto over adoption. The explanation offered by Justice Stevens for New York's registry requirement in *Lehr* serves quite well also to explain California's refusal to give the unwed father of the newborn an exclusive veto over adoption equivalent to the mother:

> "The New York Legislature concluded that a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees." (*Lehr v. Robertson*, 467 U.S. 248, 264.)

The mother has relinquished this child; an adoptive placement–now seven years in duration, the entire length of this child's life–is now long established. The father

took advantage of none of the statutory opportunities which California law affords–opportunities which if availed of would have given him in the first year of his child's life an absolute veto over the adoption. Analysis of competing due process considerations must yield but one result in these circumstances: The child's interest in stability must prevail.

IV. The Use of the Detriment/Best Interests of the Child Standard, Even in the Absence of a Finding of Parental Unfitness, Violates Neither the Procedural or Substantive Due Process or Equal Protection Rights of the Unwed Father

The best interests of the child standard has been the foundation of American child custody law since the nineteenth century. (Clark, *The Law of Domestic Relations in the United States*, section 19.6 (2d ed. 1988).) Appellant says the best interests of the child standard "is noble and high-minded . . . but the application is confusing, uncertain, and subject to contrary definition from case to case." (See Brief of Appellant, p. 38.) Is the best interests standard constitutionally imprecise?

The Supreme Judicial Court of Massachusetts, per Justice Kaplan, rejecting this contention, made the helpful observation about the best interests of the child standard that mathematical precision was not possible when defining a concept like best interests. (*Petition of New England Home for Little Wanderers*, 367 Mass. 631, 646, 328 N.E. 2d 854, 863 (1975).) How have the state courts reacted on the whole to these contentions of vagueness and imprecision with respect to the best interests of the child standard? Professor Clark responds to this question as follows:

> "Although it is extraordinary that constitutional principles should be so uncertain when applied to the most fundamental of human relationships, perhaps we can take some comfort from the large measure of agreement among courts that reasonable legislative attempts to define the circumstances in which parental rights may be terminated will not be held void for vagueness, pursuant to that vaguest of

all constitutional principles. The interests of both parents and children are best served by an informed and sensitive judiciary operating under statutes giving them workable standards." (Clark, *supra*, pp. 892-893.)

This Court has implicitly approved the validity of the best interests standard. *Santosky v. Kramer,* 455 U.S. 745 (1982), involved a New York termination of parental rights proceeding on the basis of neglect; the best interests of the child standard was used. However, the standard of proof in the proceeding was the fair preponderance of the evidence. The Court, per Justice Blackmun, said the clear and convincing standard of proof should have been used.

In short, the Court could have held in *Santosky* that the terms neglect and bests interests of the child are constitutionally vague. To have done so would have destroyed the entire legal fabric of family law in the United States. Wisely, the Court chose not to take such a course. Instead, the Court chose to cope with any problem of imprecision in the quasi-criminal New York neglect proceeding by requiring a stricter standard of proof, i.e., the clear and convincing standard of proof.

Appellant contends that a fundamental issue in this proceeding is whether it constitutes a denial of equal protection for California to terminate the parental rights of an unwed father without a finding of unfitness since presumed fathers and unwed mothers would not lose their rights absent such a finding. (See Brief for Appellant, p. i.) The necessary implication of this contention is that the use of the detriment/best interests of the child standard in this proceeding without a specific judicial finding of unfitness is constitutionally improper. An identical contention was made in similar circumstances before the District of Columbia Court of Appeals on substantive due process grounds. In *Matter of P.G.*, 452 A.2d 1183 (D.C.App. 1982), an unwed father contended that the District of Columbia adoption law violated "due process by permitting the termination of parental rights over the objection of a natural parent, without a finding

that the natural parent is unfit to raise the child." In *Matter of P.G.*, the unwed father grounded his contention of a substantive due process theory based on *Stanley v. Illinois*, 405 U.S. 645 (1972). Judge Newman, speaking for the District of Columbia Court of Appeals, rejected the appellant unwed father's contention: "[A]ppellant's claim is not founded on procedural, but substantive due process–a challenge to the best interest standard. Contrary to appellant's suggestion, *Stanley* does not stand for the proposition that the father of an illegitimate child has a constitutional right to block an adoption unless he is unfit. Lack of fitness was an essential finding in that case only because *under state law*, that was the only basis for granting an adoption without parental consent even when the parents were married." (*Id.* at p. 1184.) In addition, the District of Columbia Court of Appeals in *Matter of P.G.* read *Quilloin* as finding "that the best interest standard satisfied the due process rights of the nonconsenting parent, *at least where the effect is simply to recognize an existing family unit.*" (*Id.* at p. 1184.) Under this interpretation, *Quilloin* holds that the best interests standard should prevail where the child has already been integrated for some time, as in the instant proceeding, into the adoptive family. This is not to say that *Quilloin* holds that the best interests standard will "always suffice" in other situations. (*Id.* at p. 1185.)

In this case, as in the factual context in *Stanley*, the alleged necessity for a finding of unfitness is based on a state law claim rather than on federal constitutional standards. In fact, in this proceeding this contention is an overstatement. In *Baby Girl M., supra*, 37 Cal.3d 65 at 67-68, Justice Sonenshine, speaking for the Supreme Court of California, stated the issue as follows: "We are asked to determine whether the trial court erred in terminating a natural father's parental right by considering only the best interests of the child without first considering whether an award of custody to him would be detrimental to the child. We conclude section 4600 is applicable to all section 7017, subdivision (d) proceedings and reverse the judgment." Thus, it is detriment which

the California court spoke of rather than unfitness. As the result on remand in the California courts in this case illustrates, detriment is a different standard from unfitness; detriment is evaluated from the point of view of the child. Undoubtedly for the trial court, which is so close to the difficult human realities of the real life situation, the detriment standard becomes another rubric for the necessary and inevitable focus on the best interests of the child. This, of course, is why the trial court on remand rejected the appellant's claims.

Justice Mosk, who dissented in *Baby Girl M.*, devotes much of his dissent to a statutory analysis in support of his conclusion that the "application of the detriment standard to a natural father gives him the identical veto powers over an adoption and the same custodial rights as are granted to a presumed father under section 7017." (*Id.* at p. 78.) In short, neither the majority nor the dissenting opinions of the California Supreme Court in *Baby Girl M.* proceeded on a theory that detriment, much less proof of unfitness of the unwed father, were constitutionally required under the Fourteenth Amendment.

After analyzing the relevant California legislation as it stood at that time, Justice Mosk concluded: "There is no persuasive reason why the best interest of the child should not be a sufficient standard to test the custodial rights of a man who has had no relationship of any nature with a child other than biological." (*Id.* at p. 77.) California has since made the best interests of the child standard the exclusive legislative standard. But the unfitness-detriment standard which the appellant says should have been applied to him as a precondition to loss of custody is based on an analysis of California statutes. This Court has never required, as a matter of federal constitutional law, that such a standard be applied to the unwed father in this context in preference to the best interests of the child standard. This is especially true where, as here, preservation of a long term existing family unit with which the adoptive child is fully integrated exists and where the unwed father has failed to seize the

statutory opportunities for fatherhood. In such circumstances, he should not be given the intrusive and disruptive rights for which he now contends. *Santosky, Stanley* and *Quilloin* fully support the use and constitutional validity of the best interests of the child standard in circumstances like these.

V. The Distinction California Makes Between Defined Presumed Fathers and Other Fathers is Consistent With Equal Protection

Appellant complains that under California law presumed fathers have the same custody and veto rights over adoption as unwed mothers. (See § 7017, subd. (d); J.S. 7?a.) Unlike unwed fathers, presumed fathers and unwed mothers may have their parental rights terminated "only for incapacity to parent, neglect, or abandonment on specified grounds with particular proof." (See Brief for Appellant, p. 33.) Appellant then, in a gross over-statement, continues: "The legislative presumption, upheld by California courts, is that many of the non-presumed fathers, natural fathers, do not care about their children." (See Appellant's Brief, p. 33.)

The point these contentions overlook is that it was not the state but the appellant himself who is responsible for the status of which he complains. Appellant had it within his power to become a presumed father. If he had received custody from the proceedings in this case, he would have been a presumed father. He could have filed an action to establish the parent-child relationship to use the language of the California version of the Uniform Parentage Act. Moreover, the appellant never sought personal custody.

A corollary of appellant's contention that as an unwed father he is being treated differently than presumed fathers is that he is being treated differently than a married father and is therefore denied equal protection. In *Parham v. Hughes*, 441 U.S. 347 (1979), this Court was faced with the question of whether a Georgia statute which denied the unmarried father of an illegitimate child the right to sue for the wrongful death of the child

violated both the due process and equal protection clauses of the Fourteenth Amendment. Under Georgia law, unmarried mothers as well as legally recognized mothers of the child and legal fathers (this term includes an unmarried father who legitimized the child) could recover for wrongful death of the child. Here as in *Parham* the unwed father claimed he was placed in a special discriminated against status. Justice Stewart for the plurality in *Parham* rejected this contention.

In the case before this court, appellant also had an opportunity to bring a filiation proceeding at any time prior to February 26, 1982 the date of judgment in the TROF proceeding. Such an action by the appellant would have stayed the TROF proceeding. (§ 7006.) Failure to establish fatherhood in this proceeding like failure to legitimate in *Parham* led to adverse consequences for the unwed father; but in each case the state had created a vehicle to put that father on an equal footing. What was the reason for the differential treatment of the unwed father in each case? The State of Georgia in *Parham* wished to make sure that only legitimate fathers could make claims on behalf of the deceased child, thus minimizing multiple lawsuits and thus avoiding fraudulent claims.

In this case, California asks a father to establish filiation in order to show that he intends to assume the full panoply of parental responsibilities. The policy behind the statute under review, section 7017, is that a biological father who has evidenced no concern for his offspring must be differentiated from the biological father who has made manifest his concern. The reason for this distinction is not only the administrative concern to protect the viability of the adoption process. The administrative convenience of government officials may not itself justify the distinction of which appellant complains. (*Frontiero v. Richardson*, 441 U.S. 667 (1973).) But the more substantive issue is the best interests of the child. This concern reflects the belief society has that the newborn's best interest is served by the speedy and smooth transition to a permanent family. The hypothetical interest in

his offspring by an absent biological father can not hold this entire process hostage.

VI. Equal Protection Is Not Violated If A State Conditions Adoption Of A Newborn On Obtaining a Natural Mother's Consent Without Requiring Such Consent From the Natural Father As Well

Appellant contends that the mother here had "exactly the same kind of veto power" which was invalidated in *Caban v. Mohammed* 441 U.S. 380 (1979). (Brief for Appellant, p. 31) Reference is then made to the holding in *Caban* that the statute under review there, section 111 of the New York Domestic Relations Law (McKinney 1977), was an example of "'overbroad generalizations' in gender-based classifications." (*Id.* at p. 394.) Although it is true the unwed mother's consent to adoption was necessary under California law and the unwed father's consent was not, the situations are not exact. Nor did the *Caban* court hold that "gender-based classifications" between unwed mothers and unwed fathers were invariably overbroad and invalid.

In fact, Justice Powell in *Caban* specifically mentioned problems that might ensue from a constitutional requirement that the power to consent to adoptions be identical for unwed fathers and unwed mothers. Such problems include difficulties associated with locating and identifying unwed fathers at birth. The Court then – significantly for this proceeding – said, "[T]hese difficulties need not persist past infancy." (*Id.* at p. 392.) But the Court recognized the justifiable differences that existed, and still exist, between the legal rights of the unwed father and the unwed mother if the rights of an infant or newborn are involved.

Justice Powell specifically emphasized in *Caban* that its facts dealt with an older child whose father had come forward to participate in its rearing. On the question of whether constitutionally an unmarried father's consent to adoption must be obtained from him as it must be from the mother in the case of a newborn, Justice Powell

specifically set aside resolution of the issue (*Id.* at p. 392, fn. 11.)

This case presents the issue that *Caban* left open for resolution: Whether equal protection was violated if a state conditioned adoption on obtaining an unwed mother's consent without requiring such consent from the unwed father as well. In dissent in *Caban*, Justice Stevens addressed the issue as it affects newborns. Cautioning against a "merely reflexive rejection of gender-based distinctions" (*Id.* at p. 403), Justice Stevens pointed out most adoptions involved newborns or very young children. Therefore, it was important to make a candid appraisal of the differences between unwed mothers and unwed fathers in this situation. The mother bears the child; indeed, she has a "constitutional right to decide whether to bear it or not." (*Id.* at p. 404.) These and other differences, Justice Stevens reasoned, made it probable that "the mother, and not the father or both parents, will have custody of the newborn infant." (*Id.* at p. 405.)

The fact that the newborn is found with its mother at birth make it, Justice Stevens concluded, "virtually inevitable that from conception through infancy the mother will be consistently faced with decisions about how best to care for the child." (*Id.* at p. 406.) The father in this case had vacillated. At first, he did not want custody. The mother's first information on the placement desires of the father was that he wished the child to be placed with another family. (See this Brief, pp. 2-3.) From the child's birth the mother was confronted with the question: "[h]ow best to care for the child"? (*Id.* at p. 406.) Justice Stevens concluded:

> "[A]s a matter of equal protection analysis, it is perfectly obvious that at the time and immediately after a child is born out of wedlock, differences between men and women justify some differential treatment of the mother and father in the adoption process." (*Id.* at 406-407.)

In *Caban*, Justice Stevens thought the gender-based distinction was clearly "justified in those cases in which the rule (lodging consent to adoption exclusively with the

natural mother) has its most frequent application – cases involving newborn infants and very young children in custody of their natural mothers." (*Id.* at p. 410.) Justice Stevens argued that a state statute giving only the mother a veto power over adoption in such circumstances should not be rendered invalid.

Justice Stevens declared that where a "subclass is small and its disadvantage insignificant" in comparison with the benefits of the rule, a gender-based distinction alone does not justify a conclusion of equal protection violation. (*Id.* at p. 410.) Appellee sets forth Justice Stevens' analysis in some detail because his dissent is predicated on what he believed was the *Caban* court's "undisputed assumption," (*Id.* at 410), that giving the mother of the newborn an exclusive veto over adoption is not only constitutionally valid but has many reasons to recommend it, *i.e.*, giving the unwed mother maximum flexibility in deciding how to best care for the child as well as giving a loving father an incentive to marry thereby legitimating the child. In such circumstances, under New York law (as would be the case under the law of California in this proceeding), the father would be assured "the right to consent to any adoption." (*Id.* at p. 407, fn. 14.)

In short, if *Caban* is closely analyzed, the majority of the court specifically declined to pass on whether a statute giving the unwed mother but not the unwed father an exclusive right to consent to adoption violated the equal protection clause *in the case of newborns*. (Emphasis supplied.) Indeed, Justice Stewart in dissent assumes that the statutory difference in treatment between the unwed mother and the unwed father in the case of newborns (in terms of consent to adoption) was the paradigm justification for a gender-based distinction:

> "With respect to a large group of adoptions – those of newborn children and infants – unwed mothers and unwed fathers are simply not similarly situated, as my Brother Stevens has demonstrated. Our law has given the unwed mother the custody of her illegitimate children precisely because it is she who bears

the child and because the vast majority of unwed fathers have been unknown, unavailable, or simply uninterested. See H. Clark Law of Domestic Relations, 176-177 (1968), H. Krause, Illegitimacy, Law and Social Policy, 29-39 (1971). This custodial preference has carried with it a correlative power in the mother to place her child for adoption or not to do so." (*Id.* at pp. 398-399.)

Justice Stevens in dissent in *Caban* protested the invalidation of a New York law which gave a veto power over adoption to the unwed mother but not to the unwed father. He did not think that invalidating the entire classification to cope with the isolated case of the father of an older child who had participated in its rearing was justified:

"The mere fact that an otherwise valid general classification appears arbitrary in an isolated case is not a sufficient reason for invalidating the entire rule. Nor, indeed, is it a sufficient reason for concluding that the application of a valid rule in a hard case constitutes a violation of equal protection principles. We cannot test the conformance of rules to the principle of equality simply by reference to exceptional cases. (*Id.* at pp. 411-412.)

Several conclusions emerge from this analysis. First, *Caban* is consistent with *Quilloin* in that the focus of each case is on the quality of the unwed father's commitment to and actual responsibility for the welfare of the child and the existence of an existing mutual relationship between the unwed father and the child. Second, *Caban* simply does not support a conclusion that terminating the parental rights of the unwed father of a newborn violates equal protection because the mother's rights could not be similarly cut off. Third, a reading of Justice Stevens' dissent is persuasive that the "undisputed assumption" of the *Caban* court was that a gender-based distinction in the case of newborns is justified.

Similar gender-based legislation in other states has been held after careful analysis to meet constitutional standards. In *In re Interest of T.E.T.*, 603 S.W.2d 793 (Tex. 1980), *cert. den.* 450 U.S. 1025 (1981), the Texas Supreme

Court upheld the requirement of the Texas Family Code that the biological father of the illegitimate child, but not the mother, had to establish parental status in a legitimation proceeding. The Texas Supreme Court relying on *Caban, supra,* held that its gender-based statute met a "valid objective in requiring the biological father to establish his 'status' as a parent": "Otherwise, we would recognize a sperm donor, a rapist, a 'hit and run' lover, an adulterer and the like in the same legal status as a father who had accepted the legal and moral commitment to his family. While recognizing this valid distinction, Texas law offers the biological father of an illegitimate child the opportunity to prove in which category he belongs." (*Id.*, at p. 797.) The Texas Supreme Court held that equal protection was not violated if the state chose in the best interests of illegitimate children to distinguish among fathers in order to identify those who had sought out the opportunity to avow a "legal and moral commitment" to parenthood.

However, this was not the only interest served by the gender-based distinction in the Texas Family Code. This distinction also served the state's interest in protecting illegitimate children: "[The mother] can choose to abort the child or she may carry it full term. The State has a substantial interest in encouraging the unwed mother to properly care for the child by assuring her that her wishes as to the disposition of the child will not, absent her consent or a finding of the child's best interest, be subject to the absolute veto of the biological father. This statute is substantually related to the achievement of that interest." (*Id.*) Appellee submits that the two state interests asserted by the Texas Supreme Court to be important state objectives which justify the similar gender-based distinction of the Texas Family Code – (1) the state's need to assure itself that the father has a legal and moral commitment to fatherhood and (2) the state's concern that awarding an indiscriminate veto to the father would prompt the mother to make choices adverse to the child which she would not otherwise make – are directly relevant to the question of the validity of section 7017 in this

proceeding and similarly justify a conclusion that section 7017 is also valid.

Lehr v. Robertson, 463 U.S. 248, 266-268 (1983), held that where an unwed father has never established a substantial relationship with his daughter, the New York statutes at issue in *Lehr* did not operate to deny Mr. Lehr equal protection. The State of New York maintains a putative father registry which allows the father of a child born out of wedlock – as was the case in *Lehr* – to file a notice of intent to claim paternity. Under such circumstances, the person filing such a notice of intent is entitled to receive notice of any proceeding to adopt the illegitimate child.

Jonathan Lehr, the unwed father, although knowing of the birth of the child (as did appellant here) failed to avail himself of the opportunity to claim paternity by filing a notice of intent in the registry. Lehr did more in the way of showing some of the concerns of fatherhood than appellant here. For example, he offered "to provide financial assistance and to set up a trust fund for [the child]." (*Id.* at p. 269.) Nonetheless, the Court held in *Lehr* that failure to strictly comply with the registry law cut off his notice rights. Justice Stevens, speaking for the Court, explained why the failure to avail himself of the New York law did not deprive the father of equal protection. This was so even though if the child had been living with him, or if the mother's consent was involved, there would have been no requirement to file with the registry: "If one parent has an established custodial relationship with the child and the other parent has either abandoned, or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights." (*Id.* at pp. 267-268.) In reaching this conclusion, the Court stated: "Those [registry] procedures are designed to promote the best interests of the child, to protect the rights of interested parties, and ensure promptness and finality." (*Id.* at p. 266.) The governmental objectives behind section 7017 are, as was pointed out in the section on gender-based classifications, similarly identical to the policies served by the New York

registry for putative fathers procedure. Similarly, section 7017 does not violate equal protection any more than did the statute establishing the registry for putative fathers in *Lehr*.

In *Quilloin v. Walcott, supra*, similar equal protection contentions were also rejected. (The facts of *Quilloin* are set forth in the section on substantive due process.) Justice Marshall declared in *Quilloin* in language very relevant to this proceeding: " . . . [A]ppellant asserts that his interests are indistinguishable from those of a married father who is separated or divorced from the mother and is no longer living with his child, and therefore the state acted impermissibly in treating his case differently." (434 U.S. at p. 256.) Justice Marshall rejected the unwed father's equal protection arguments for the following reasons:

> "Although appellant was subject . . . to essentially the same child support obligation as a married father would have had . . . he has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." (*Id.*)

Justice Marshall concluded: "Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child." (*Id.*) In short, the implicit argument in appellant's brief that anything less than absolute gender-neutrality in California's adoption and termination laws violates equal protection is completely in conflict with recent well-considered decisions of this Court from *Quilloin* to *Lehr*.

In *Caban*, Justice Powell said, "Gender-based distinctions 'must serve governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause." This standard of review is sometimes called the intermediate standard of review. (See *Craig v. Boren*, 429 U.S. 190, 197 (1977).) What governmental

objectives is California attempting to achieve by employing the distinctions appellant complains of in section 7017? In a discussion of the Uniform Parentage Act's provision that consent to adoption need not be obtained from the unwed biological father, Professor Clark suggests that the theme of these statutory distinctions between unwed mother and unwed father is focused on maximizing "the children's opportunities for a suitable placement and a stable family life." (See Clark, p. 883.)

The California Supreme Court has itself identified the important governmental objectives served by the classifications established in section 7017. In *Michael U. v. Jaime B., supra,* 39 Cal.3d 787, a similar situation to the instant case was presented. A special class of fathers with no right to veto adoptions served important government objectives:

> "It is presumably detrimental to a child to award custody to a parent who is so unfit that the state might have to intervene to retrieve custody, but it also might be detrimental to place him with a parent who is not unfit, *depending upon the child's current circumstances and the available placement alternatives.*" (Emphasis supplied.) (39 Cal.3d 787, 796, fn. 8.)

The policy behind California's statutory scheme in this context facilitates a focus on the child by expediting placement and by emphasizing consideration of the child's present and current circumstances. Nor is such a statutory policy unfair to the father since he possesses remedies to move himself to another status, that of being a presumed father. This status gives the father new rights. But if the unwed father fails to seize such opportunities, the unwed father cannot be allowed to frustrate the state's important interest in securing an available placement.

An additional question remains. Under the standard of review set forth by Justice Powell in *Caban*, it is not enough to show the important governmental objective the state seeks to serve – in this case assuring the timely permanent placement of the child through adoption. The classification at issue must substantially relate to that

goal. Is creating a class of unwed fathers without a right to consent to adoption substantially related to this goal? Consider that the unwed father is not as identifiable as the unwed mother nor is he necessarily interested in fatherhood. The state responds to this biological reality by attempting to minimize the time the child is in a placement limbo at the same time that it gives equivalent opportunities to the unwed father once he comes forward and moves himself to the category of presumed father. The state is attempting to accommodate competing interests. If gender-neutrality is the only test by which this scheme is to be judged, then the rights of the newborn are unnecessarily subordinated since the newborn will be in placement limbo if equivocation on the part of the unwed father is allowed.

In *Michael M. v. Superior Court*, 450 U.S. 464 (1981), the Court was presented with the issue of whether California's statutory rape law violated equal protection since it made men alone "criminally liable for the act of sexual intercourse." (*Id.* at p. 466.) Justice Rehnquist, writing for the Court, upheld the statute against an equal protection attack. Justice Rehnquist declared that the state is persuasive that "a gender-neutral statute would frustrate its interest in effective enforcement. Its view is that a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution." (*Id.* at pp. 473-474.) In the statutory rape context, "already fraught with prosecutorial difficulties," the Court said it was unwilling to hold that California had to enact a statute so broad "that it may well be incapable of enforcement" to meet the requirements of equal protection. (*Id.* at p. 474.) So here, to enact a gender-neutral statute to govern the area covered by section 7017 would come fraught with delays jeopardizing the entire adoption process; it would also frustrate the need to make immediate placements of newborns who have mothers who cannot care for them and fathers who either cannot be found or who cannot make up their minds whether they wish custody or not. As the Court concluded in *Michael M.*: "[T]his Court has consistently upheld statutes where the

gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." (*Id.* at p. 469.)

The enormity of the need for speedy placement of illegitimate newborns is illustrated by the following: In California alone in 1986 out of 481,805 births, 127,457 (approximately 1 out of 4) were illegitimate (Vital Statistics of California – 1986, California State Department of Health Services, Sacramento, Calif.). It is therefore not surprising that California and the legislatures of eight of the other states who have, with some variations, enacted the Uniform Parentage Act have given an exclusive veto over adoption to the mother but not to the unwed father. (See Hawaii Rev. Stat., § 584-24; Kan. Stat. Ann., § 38-1129; Minn. Stat. Ann., § 257.74; Mont. Rev. Code Ann., § 40-6-25; Nev. Rev. Stat., § 128.150; N.D. Cent. Code, §§ 17-14-24; Ohio Rev. Code Ann., § 3107.06; Wash. Rev. Code, §§ 26.26.190, 26.33.120.) These laws reflect the policy that avoidance of delay and the need for immediate placement justify the gender classification in section 7017 (see generally: Krause, *The Uniform Parentage Act*, 8 Family Law Quarterly 1, 14 (1974).

In *Michael M.*, the Court observed: "The question whether a statute is *substantially* related to its asserted goals is at best an opaque one. It can be plausibly argued that a gender-neutral statute would produce fewer prosecutions than the statute at issue here." (*Id.* at p. 474, fn. 10.) The Court then mentions the contrary speculations of the dissent and concluded that, in such circumstances, deference should be given to the state supreme court which was familiar with the facts and the potential impact of the statute. (*Id.*) So here, appropriate deference should be given to the considered judgment of legislatures of the states who have enacted California's version of the Uniform Parentage Act.

The well considered judgment of the California Legislature represents a means substantially related to the achievement of an important state objective, i.e., the speedy permanent placement of illegitimate children for adoption. The regulation of family law has traditionally

been left to the states. (*Lehman v. Lycoming County Children's Services, supra,* 458 U.S. 502, 511.) This Court has only recently endorsed this historic aspect of our federalism. (*Lehman v. Lycoming County Children's Services, supra,* 458 U.S. 502, 511, 512-515.)

CONCLUSION

Although appellee contends that this Court has no jurisdiction of this appeal since appellant did not seek review in a timely fashion, appellee contends that if this Court decides this case on the merits, the decision, order and judgment of the California Court of Appeals, Fourth Appellate District, Division One, should be affirmed in all respects. The child who is the center of this controversy is now seven years old. She has resided with her adoptive parents for all but five weeks of her life. California law provided the opportunity to appellant to rear his child if he had clearly and unequivocally grasped the opportunity. He did not do so. To permit this belated assault on the fabric of the Moses family threatens their peace, security and due process rights. Furthermore, acceptance of appellant's plea to confer on the unwed father an indiscriminate veto over adoption would inject a novel and unpredictable element in the future of illegitimate newborns and in the relationship between the newborn and its adoptive parents with the gravest implications for the integrity and stability of the adoption process in California and, indeed, in the United States. In light of the foregoing, the decision, order and judgment of the Court of Appeals, Fourth Appellate District, Division One, should be affirmed in all respects.

Respectfully submitted,

LLOYD M. HARMON, JR., County Counsel

JEROME A. BARRON, ESQ.

SANFORD N. KATZ, ESQ.

CALIFORNIA STATUTORY PROVISIONS

1. Civil Code Section 7017 (Stats. 1979, Ch. 752, sec. 2).

7017. (a)(1) If a mother relinquishes for or consents to or proposes to relinquish for or consent to the adoption of a child who had (1) a presumed father under subdivision (a) of Section 7004 or (2) a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, the father shall be given notice of the adoption proceeding and have the rights provided under Chapter 2 (commencing with Section 221), Title 2, Part 3, Division 1 of the Civil Code, unless the father's relationship to the child has been previously terminated or determined by a court not to exist or the father has voluntarily relinquished or consented to the adoption of such child.

(2) If a father relinquishes or consents to or proposes to relinquish a child for adoption, the mother shall be given notice of the adoption proceeding and have the rights provided under Chapter 2 (commencing with Section 221), Title 2, Part 3, Division 1 of the Civil Code, unless the mother's relationship to the child has been previously terminated by a court or the mother has voluntarily relinquished or consented to the adoption of such child.

(b) If a mother relinquishes for, consents to, or proposes to relinquish for or consent to the adoption of a child who does not have (1) a presumed father under subdivision (a) of Section 7004 or (2) a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, or if a child otherwise becomes the subject of an adoption proceeding

and the alleged father, if any, has not, in writing, denied paternity, waived his right to notice, voluntarily relinquished or consented to the adoption, the agency or person to whom the child has been or is to be relinquished, or the mother or the person having custody of the child, shall file a petition in the superior court to terminate the parental rights of the father, unless the father's relationship to the child has been previously terminated or determined not to exist by a court, or unless the father has been served as prescribed in subdivision (f) with a written notice alleging that he is or could be the natural father of the child to be adopted or placed for adoption and has failed to bring an action for the purpose of declaring the existence of the father and child relationship pursuant to subdivision (c) of Section 7006 within 30 days of service of such notice or the birth of the child, whichever is later.

(c) In an effort to identify the natural father, the court shall cause inquiry to be made of the mother and any othe appropriate person by the State Department of Social Services, a licensed county adoption agency, or the licensed adoption agency to which the child is to be relinquished, or in the case of a stepparent adoption, at the option of the board of supervisors, a licensed county adoption agency, the county department designated by the board of supervisors to administer the public social services program, or the county probation department. The inquiry shall include the following: whether the mother was married at the time of conception of the child or at any time thereafter; whether the mother was cohabiting with a man at the time of conception or birth of the child; whether the mother has received support payments

or promises of support with respect to the child or in connection with her pregnancy; or whether any man has formally or informally acknowledged or declared his possible paternity of the child. The department or the licensed adoption agency shall report the findings to the court.

(d) If, after the inquiry, the natural father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given notice of the proceeding in accordance with subdivision (f), unless he has been served with a written notice alleging that he is or could be the natural father of the child to be adopted, or placed or relinquished for adoption and has failed to bring an action pursuant to subdivision (c) of Section 7006 to declare the existence of the father and child relationship within 30 days of serving such notice or the birth of the child, whichever is later. If any of them fails to appear or, if appearing, fails to claim custodial rights, his parental rights with reference to the child shall be terminated. If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine parentage and custodial rights in whatever order the court deems proper. If the court finds that the man representing himself to be the natural father is a presumed father under subdivision (a) of Section 7004, then the court shall issue an order providing that the father's consent shall be required for an adoption of the child. In all other cases, the court shall issue an order providing that only the mother's consent shall be required for the adoption of the child.

(e) If, after the inquiry, the court is unable to identify the natural father or any possible natural father and no

person has appeared claiming to be the natural father and claiming custodial rights, the court shall enter an order terminating the unknown natural father's parental rights with reference to the child.

(f) Notice of the proceeding shall be given to every person identified as the natural father or a possible natural father in accordance with the provisions of the Code of Civil Procedure for the service of process in a civil action in this state, provided that publication or posting of the notice of the proceeding shall not be required. Proof of giving the notice shall be filed with the court before the petition is heard. However, if a person identified as the natural father or possible natural father cannot be located or his whereabouts are unknown or cannot be ascertained, the court may issue an order dispensing with notice to such person.

(g) Any order requiring or dispensing with a father's consent for the adoption of a child may be appealed from in the same manner as an order of the juvenile court declaring a person to be a ward of the juvenile court.

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2. Civil Code Section 7017 (Stats. 1986, Ch. 1370, sec. 2).

7017. (a)(1) If a mother relinquishes for or consents to or proposes to relinquish for or consent to the adoption of a child who has (1) a presumed father under subdivision (a) of Section 7004 or (2) a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, the father shall be given notice of the adoption proceeding and have the

rights provided under Chapter 2 (commencing with Section 221) of Title 2 of Part 3 of Division 1 of the Civil Code, unless the father's relationship to the child has been previously terminated or determined by a court not to exist or the father has volunarily relinquished or consented to the adoption of the child.

(2) If a father relinquishes or consents to or proposes to relinquish a child for adoption, the mother shall be given notice of the adoption proceeding and have the rights provided under Chapter 2 (commencing with Section 221) of Title 2 of Part 3 of Division 1 of the Civil Code, unless the mother's relationship to the child has been previously terminated by a court or the mother has voluntarily relinquished or consented to the adoption of the child.

(b) If a mother relinquishes for, consents to, or proposes to relinquish for or consent to the adoption of a child who does not have (1) a presumed father under subdivision (a) of Section 7004 or (2) a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, or if a child otherwise becomes the subject of an adoption proceeding and the alleged father, if any, has not, in writing, denied paternity, waived his right to notice, voluntarily relinquished or consented to the adoption, the agency or person to whom the child has been or is to be relinquished, or the mother or the person having custody of the child, shall file a petition in the superior court to terminate the parental rights of the father, unless the father's relationship to the child has been previously terminated or determined not to exist by a court, or

unless the father has been served as prescribed in subdivision (f) with a written notice alleging that he is or could be the natural father of the child to be adopted or placed for adoption and has failed to bring an action for the purpose of declaring the existence of the father and child relationship pursuant to subdivision (c) of Section 7006 within 30 days of service of the notice or the birth of the child, whichever is later.

(c) In an effort to identify the natural father, the court shall cause inquiry to be made of the mother and any othe appropriate person by the State Department of Social Services, a licensed county adoption agency, or the licensed adoption agency to which the child is to be relinquished, or in the case of a stepparent adoption, at the option of the board of supervisors, a licensed county adoption agency, the county department designated by the board of supervisors to administer the public social services program, or the county probation department. The inquiry shall include the following: whether the mother was married at the time of conception of the child or at any time thereafter; whether the mother was cohabiting with a man at the time of conception or birth of the child; whether the mother has received support payments or promises of support with respect to the child or in connection with her pregnancy; or whether any man has formally or informally acknowledged or declared his possible paternity of the child. The department or the licensed adoption agency shall report the findings to the court.

(d) *(1)* If, after the inquiry, the natural father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given

notice of the proceeding in accordance with subdivision (f), unless he has been served with a written notice alleging that he is or could be the natural father of the child to be adopted, or placed or relinquished for adoption and has failed to bring an action pursuant to subdivision (c) of Section 7006 to declare the existence of the father and child relationship within 30 days of serving the notice or the birth of the child, whichever is later. If any of them fails to appear or, if appearing, fails to claim parental rights, his parental rights with reference to the child shall be terminated.

(2) If the natural father or a man representing himself to be the natural father, claims *parental* rights, the court shall determine *if he is* the *father. The* court *shall then determine if it is in the best interest of the child that the father retain his parental rights, or that an adoption of the child be allowed to proceed. The court, in making that determination, may consider all relevant evidence, including the efforts made by the father to obtain custody, the age and prior placement of the child, and the effects of a change of placement on the child. If the court finds that it is in the best interest of the child that the father should be allowed to retain his parental rights, it shall order that his consent is necessary for an adoption.* If the court finds that the man *claiming parental rights is not* the father, *or that if he* is *the* father *it is in the child's best interest that an adoption be allowed to proceed, it shall* order *that* that *person's* consent *is not* required for an adoption; *such a finding terminates all parental rights and responsibilities with respect to* the child. *Section 4600 does not apply to this proceeding. Nothing in this section changes the rights of a presumed father.*

(e) If, after the inquiry, the court is unable to identify the natural father or any possible natural father and no person has appeared claiming to be the natural father and claiming custodial rights, the court shall enter an order terminating the unknown natural father's parental rights with reference to the child.

(f) Notice of the proceeding shall be given to every person identified as the natural father or a possible natural father in accordance with the provisions of the Code of Civil Procedure for the service of process in a civil action in this state, provided that publication or posting of the notice of the proceeding shall not be required. Proof of giving the notice shall be filed with the court before the petition is heard. However, if a person identified as the natural father or possible natural father cannot be located or his whereabouts are unknown or cannot be ascertained, the court may issue an order dispensing with notice to that person.

(g) Any order requiring or dispensing with a father's consent for the adoption of a child may be appealed from in the same manner as an order of the juvenile court declaring a person to be a ward of the juvenile court. (Italics added.)

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3. Civil Code Section 4600 (Stats. 1979, Ch. 915, sec. 3).

4600. (a) The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage,

and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of the child during minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an award of custody or modification thereof. In determining the person or persons to whom custody should be awarded under paragarph (2) or (3) of subdivision (b), the court shall consider and give due weight to the nomination of a guardian of the person of the child by a parent under Article I (commencing with Section 1500) of Chapter 1 of Part 2 of Division 4 of the Probate Code.

(b) Custody should be awarded in the following order of preference according to the best interests of the child:

(1) To both parents jointly pursuant to Section 4600.5 or to either parent. In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's sex.

The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

(2) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

(3) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

(c) Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

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4. Civil Code Section 7006 (Stats. 1979, Ch. 752, sec. 1).

7006. (a) A child, the child's natural mother, or a man presumed to be his father under paragraph (1), (2), or (3) of subdivision (a) of Section 7004, may bring an action as follows:

(1) At any time for the purpose of declaring the existence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004.

(2) For the purpose of declaring the nonexistence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

(b) Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under paragraph (4) of subdivision (a) of Section 7004.

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7004 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. The commencement of such an action shall suspend any pending proceeding in connection with the adoption of such child, including a proceeding pursuant to subdivision (b) of Section 7017, until a judgment in the action is final.

(d) Except as to cases coming within the provisions of Section 621 of the Evidence Code, a man not a presumed father may bring an action for the purpose of

declaring that he is the natural father of a child having a presumed father under Section 7004, if the mother relinquishes for, consents to, or purposes to relinquish for or consent to, the adoption of the child. Such an action shall be brought within 30 days after the man is served as prescribed in subdivision (f) of Section 7017 with a notice that he is or could be the father of such child or the birth of the child, whichever is later. The commencement of such action shall suspend any pending proceeding in connection with the adoption of such child until a judgment in the action is final.

(e) Regardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bear an action under this section.

(f) An action under this section may be brought before the birth of the child.

(g) The district attorney may also bring an action under this section in any case in which he believes that the interests of justice will be served thereby.

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5. Civil Code Section 7006 (Stats. 1986, Ch. 1408, sec. 3).

7006. (a) A child, the child's natural mother, or a man presumed to be the child's father under paragraph (1), (2), or (3) of subdivision (a) of Section 7004, may bring an action as follows:

(1) At any time for the purpose of declaring the existence of the father and child relationship presumed

under paragraph (1), (2), or (3) of subdivision (a) of Section 7004.

(2) For the purpose of declaring the nonexistence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

(b) Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under paragraph (4) of subdivision (a) of Section 7004.

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7004 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. Such an action shall be consolidated with a proceeding pursuant to subdivision (b) of Section 7017. The parental rights of the alleged natural father shall be determined as set forth in subdivision (d) of Section 7017.

(d) Except as to cases coming within the provisions of Section 621 of the Evidence Code, a man not a presumed father may bring an action for the purpose of declaring that he is the natural father of a child having a presumed father under Section 7004, if the mother relinquishes for, consents to, or purposes to relinquish for or consent to, the adoption of the child. Such an action shall be brought within 30 days after the man is served as prescribed in subdivision (f) of Section 7017 with a notice that he is or could be the father of the child or the birth of the child, whichever is later. The commencement of the action shall suspend any pending proceeding in connection with the adoption of the child until a judgment in the action is final.

(e) Regardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bar an action under this section.

(f) An action under this section may be brought before the birth of the child.

(g) The district attorney may also, at his or her discretion, bring an action under this section in any case in which the district attorney believes it to be appropriate.